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No. 499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 499

PATRICIA R. O'BRIEN,

Petitioner,

vs.

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL; EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN and RICHARD J. WHELAN, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased; THE FIDELITY & COLUMBIA TRUST CO. and the LOUISVILLE TRUST COMPANY, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and EDWARD J. O'BRIEN & CO., a Co-partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the WILL OF ELIZABETH GRAVES O'BRIEN, Deceased,

Respondents.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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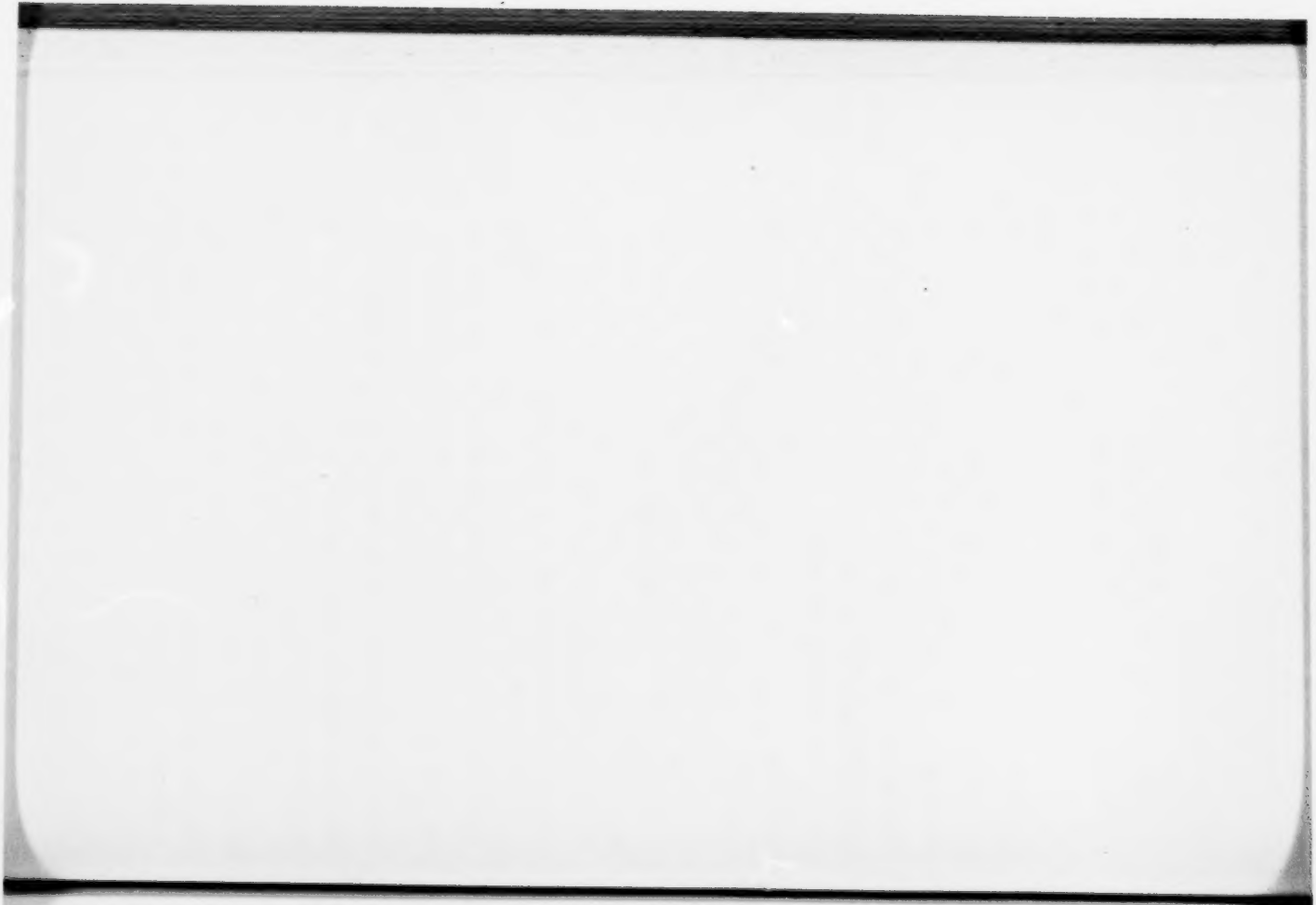

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The petitioner, Patricia R. O'Brien, respectfully prays for a reconsideration by the court of its order of January 31, 1944, denying certiorari herein. The time for filing a petition for rehearing has been extended by this Court to and including May 4, 1944.

This petition is filed for a writ of certiorari to review the judgment of the Court of Appeals of the State of Kentucky entered in the above entitled cause.

Jurisdiction.

The judgment of the Court of Appeals of Kentucky was finally entered on June 25, 1943, affirming the judgment of the Circuit Court of Jefferson County, Kentucky (Tr. Rec. Vol. III, p. 410), dismissing plaintiff's complaint praying for the rescission and cancellation of the sale of her deceased husband's interest in a family partnership on the ground that she had been induced to make the sale because of misrepresentations and concealment of the facts showing the true value of that interest. The opinion of the court on rehearing rendered June 25, 1943, is reported in 294 Ky. 793; 172 S. W. 2d. 595.* The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended, on the ground that the petitioner has been deprived of her right, title and privilege to property without due process of law and has been denied the equal protection of the laws in contravention of the provisions of the Fourteenth Amendment of the Federal Constitution. This question was raised and decided upon the merits adversely to petitioner by the Court of Appeals of Kentucky, the highest court of that state in which a decision in this suit could be had.

Statement.

The petitioner is the widow of John A. O'Brien who died on January 1, 1934. John A. O'Brien was the youngest son of Edward J. O'Brien, Sr. who died in 1928 and who, prior to his death formed and operated a tobacco business at Louisville, Kentucky. After his death the business continued to be conducted as a co-partnership comprised of his widow, four sons and a daughter, under the

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*We are unable to obtain Volume 294 of Official Kentucky reports. Therefore the opinion is subsequently referred to as reported in 172 S. W. 2d 595.

firm name of Edward J. O'Brien & Company. The amended articles of co-partnership (Exhibit 24) provided that the basis of the sale of the interest of a deceased partner should be "the value of the interest, *as shown by the books of the Company*, or by appraisement, plus profits and interest, if any" (Tr. R. Vol. III, p. 382).

On the death of John A. O'Brien, the petitioner as his widow was the sole beneficiary of his estate. After many preliminary negotiations over an extended period, during which the petitioner repeatedly expressed her desire not to sell her husband's interest (approximately one-quarter) in the partnership (Tr. R. Vol. III, p. 383), between November 5th and 15th, 1935, petitioner signed an agreement to sell her husband's interest to his brothers in the partnership for $380,000.00 (Tr. R. Vol. III, p. 372). This agreement was made with the contemporaneous understanding that the brothers would waive a specious claim to proceeds of insurance policies on her husband's life wherein petitioner was named as beneficiary and that she would receive these proceeds as the beneficiary named in the policies.* The acceptance of the offer was signed by the brothers in the same period and in February 1936, the sale was completed and subsequently the $380,000.00 was paid to the co-administrators.

The consideration of $380,000.00 for John's interest in the partnership was agreed to by petitioner upon the representation by the surviving brothers and partners that the market value of John's interest in June and November, 1935, was $425,649.45. This representation was in writing and was introduced in evidence at the trial of this case as Exhibit 22. The exhibit is set forth in the original petition for certiorari at page 30.

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*See opinion of Court of Appeals of Kentucky, 172 S. W. 2d 595, 604.

Several months later the petitioner obtained information which convinced her that the value of her husband's interest in the partnership at the time of the sale was much greater than represented by his brothers. After the administrators of her husband's estate had refused to bring suit for rescission of the sale, on March 11, 1937 (Opinion, Court of Appeals, 172 S. W. 2d, 595, 597), petitioner filed her complaint in this case asking that the sale be rescinded and cancelled because of the said misrepresentation of the true value of the interest of her deceased husband in the partnership and because of the concealment of vital facts with respect thereto and a failure of the surviving partners to discharge the legal duty* imposed upon them by the partnership relation to make a full disclosure to her of all facts concerning the value of the interest at the time of the sale (Tr. R. Vol. I, p. 74).

Denial of Due Process of Law.

Shortly before the trial of this case, petitioner's counsel filed her motion with the trial court for the issuance of a subpoena duces tecum to require defendant partners to bring into court the vital books and records of the partnership, listed in the motion (Tr. R. Vol. III, pp. 256, 257), which would show the true value of the interest of John A. O'Brien. The motion was supported by the affidavit of a certified public accountant that the books of the partnership were necessary in the determination of the value of the interest of the deceased partner and that audits made by the surviving partners for some other purpose were insufficient (Tr. R. Vol. III, pp. 261, 272). On February 29, 1940 this motion was denied with respect to every original book, document or record of the partnership which would

*That the partners had this duty is found by the Court of Appeals of Kentucky, 172 S. W. 2d 595, 601.

show the value of its property, except that the motion was allowed as to tobacco inventories for the year 1935 (Tr. R. Vol. III, pp. 273, 274). The tobacco inventories as shown by the 1935 audit of the partnership gave valuations at "cost which was lower than market" (Tr. R. Vol. III, p. 301; Opinion of trial court, Tr. R. Vol. III, p. 306).

However, a few days later when petitioner's counsel presented another motion for a subpoena duces tecum which sought information as to the value of the tobacco on hand as shown by the inventory, the Court on March 20, 1940, denied this motion and on its own motion entered an order expunging that part of its prior order requiring the defendant partners to produce the tobacco inventories for 1935 (Tr. R. Vol. III, p. 297).

The result of the trial court's action was that petitioner had no evidence at the trial with which to show the true value of her husband's interest in the partnership or even to show the market value of and the profit from the sale of the stock in trade of one of the largest leaf tobacco businesses of the world. The cost value of the tobacco inventory alone was over $900,000.00 (Tr. R. Vol. III, p. 301). Evidence of the market value was barred by the denial of the subpoena *duces tecum*.

The case proceeded to trial with the petitioner being forced to rely on certain audits of the partnership books which the surviving partners had caused to be made long prior to the trial of the case and which did not bear any relation to the ascertainment of the value of John A. O'Brien's interest. They were made for other purposes. These audits, of course, were hearsay evidence, and did not afford petitioner an opportunity to examine the partnership books or to show the court what the original books would reveal in support of the claims set forth in her complaint.

By this denial of the procedural process of subpoena duces tecum which the Kentucky statute authorizing such process (see Appendix) intended to make available to every litigant, the petitioner was prevented from obtaining and presenting to the court the only genuine and competent evidence that could have proved her claims of misrepresentations, concealment and non-disclosure.

This denial of due process was not an exercise of discretionary judgment as to relevancy and competency of the documentary evidence which petitioner sought but was a denial of her right to secure the only competent evidence vital to her proofs.

Effect of the Denial of Due Process.

The articles of partnership provided that the interest of a deceased partner should be ascertained from the books of the company or by appraisement. This is exactly what the trial court rendered impossible by its denial of petitioner's motion for a subpoena duces tecum to produce the original books and records of the partnership. The futility of petitioner's position in her efforts to prove the charges in her complaint is well described by the court which denied her due process:

> **"Caution however! We must remember that Patricia's case is circumscribed by scope of the discovery allowed. If she was limited in her discovery practically to the audits, it is unreasonable to expect her to develop anything outside the reports themselves." (Tr. R. Vol. III, p. 390.)**

The courts's intimation that if anything had occurred at the trial to indicate that the audits were inaccurate or misleading he might have enlarged the scope of discovery, was meaningless since it had already prevented the peti-

tioner from obtaining the only evidence that could have shown whether the audits were inaccurate and misleading.

The trial court had already found (1) that petitioner had insisted that her husband's interest remain in the partnership for five years (Tr. R. Vol. III, p. 383); (2) that she was entitled to full information about the value of that interest before the sale was made (Tr. R. Vol. III, p. 384); (3) that there was a positive duty of disclosure relative to the value of that interest (Tr. R. Vol. III, p. 387); (4) that petitioner had wanted an independent audit of the books (Tr. R. Vol. III, p. 389); (5) that the correctness of the audits furnished petitioner was in dispute (Tr. R. Vol. III, p. 390); and (6) that any audits and inventories furnished petitioner did not list "good will" as an asset (Tr. R. Vol. III, p. 390). There is not any evidence or any finding in the record that defendants ever consented to an audit by the petitioner. All of this notwithstanding, followed by the admission of the trial court that petitioner's case was circumscribed by the scope of discovery allowed, the court, on May 23, 1940, entered its order dismissing petitioner's complaint (Tr. R. Vol. III, p. 410).

Reasons for Granting the Writ.

The primary question in this case does not involve the rather common contention that a trial court ruled erroneously on the admissability of certain evidence. Here the surviving partners in a business purchased at an unconscionably low price a decedent partner's interest from his widow, who was his beneficiary. Such sale was induced by the misrepresentation, concealment and fraud of the surviving partners. The widow, the petitioner here, brought action to rescind. To prove her case upon the trial, she vitally needed for evidence the original books and records of the partnership. The surviving partners refused to pro-

duce them. To procure this evidence, she applied to the trial court for the subpoena duces tecum, as provided by Kentucky's Code of Civil Practice. This process the Court denied in violation of her rights to due process of law and equal protection of the law, as provided in the 14th Amendment.

This Court has never been reluctant to grant certiorari in cases where the claim of a denial of due process of law has been advanced, even where the denial asserted was not as closely identified with the basic right of due process and equal protection of the law guaranteed by the Fourteenth Amendment as it is in the instant case.

In the case of *Georgia Railway & Electric Co.* v. *Decatur*, 295 U. S. 165, certiorari was granted because the trial court excluded evidence offered by petitioner to show that the improvement on account of which taxes were being assessed against the petitioner really impaired the value of petitioner's property. This was held to be a deprivation of property without due process of law. In the instant case petitioner was denied her right under the procedural statute of Kentucky to obtain evidence to establish the value of her husband's interest in the partnership and thereby was prevented from having such evidence even considered by the court. Thus petitioner was denied the right even to attempt to prove that the representations and hearsay evidence (audits) were incomplete and did not disclose either the book, market, or appraised value of her husband's interest.

In the case of *United Gas Co.* v. *Texas*, 303 U. S. 123, certiorari was granted on a ground closely akin to that in the instant case, namely that the petitioner had been denied *procedural due process*. In the *United Gas Co.* case apparently all of the evidence submitted by the petitioner was admitted but it was contended, among other things, that a

determination by a jury of the value of petitioner's property and of rates reasonable for it to charge did not afford a fair hearing on complicated issues under the Fourteenth Amendment. In the instant case the procedural rights provided by the Kentucky statutes were denied to the petitioner.

The denial of due process of law in the instant case goes beyond procedural issues and constitutes a denial of petitioner's right to present her case in court. This right is guaranteed to her by the Fourteenth Amendment. In the case of *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, the court said at page 681:

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. * * * But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

Many other cases where this court has granted certiorari on the contention of a denial of due process of law could be cited here and are cited in the original petition for certiorari at page 39.

In the instant case the completeness of the denial of due process is vividly pictured in the opinion of the Court of Appeals of Kentucky, 172 S. W. 2d 595. At page 605, the court said:

> "The articles provided that the basis of sale of a deceased partner's interest at the expiration of five years should be 'the value of the interest as shown by the books of the company or by appraisement plus profits and interest, if any.' This definite contract between all the partners as to the alternative bases of purchase and sale cannot be ignored."

Also at page 608:

> "**Moreover, this is not a settlement of a partnership upon dissolution. It is a question of valuing an interest in a continuing concern and the challenge of the fairness of the firm's manner of bookkeeping.**"

On petition for rehearing on an extended opinion of the Court of Appeals of Kentucky, petitioner raised the legal point that by the denial of her motion for a subpoena *duces tecum* to produce the books of the partnership, she had been denied due process of law under the Fourteenth Amendment. The court decided this point in the following language at page 609:

> "If the rulings of the court should be regarded as erroneous, such action does not in our opinion offend constitutional rights. Due process of law does not assure a litigant against a wrong interpretation of the law, especially procedural, or against judicial error in respect to the admission or exclusion of evidence."

Thus, after judicial pronouncement that the value of the petitioner's husband's interest in the partnership must be determined by the books of the partnership, that the question in the case was the value of that interest as shown by those books, and that the suit was a "challenge of the fairness of the firm's manner of bookkeeping"; the denial of due process of law to petitioner, through the trial court's denial of her motion for a subpoena *duces tecum* to bring in the books and original records, appears in sharp relief in a recorded opinion in contrast with the irrelevant statement in the same opinion that due process does not assure a litigant against a wrong interpretation of the law.

The petitioner's assertion of denial of the due process is not based on an asserted erroneous interpretation of the law. It is based on a denial to her of the right to prove,

by the only evidence in existence, her claim of fraud, misrepresentation, concealment and failure to disclose.

Since the federal question of denial of due process of law was raised in the highest Court of Appeal in the State of Kentucky, even though in a petition for rehearing, and was passed on by that court in its extended opinion, this Court has jurisdiction to grant certiorari and to consider and decide the substantial federal question that is here involved. *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, 24; *Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.,* 228 U. S. 326, 334; *Great Northern Ry.* v. *Sunburst Co.,* 287 U. S. 358, 367.

Furthermore, in the case of *Norris* v. *Alabama,* 294 U. S. 587, this Court held that it has a judicial duty to review the federal right that was denied to petitioner in the instant case. At pages 589 and 590 of the opinion in the *Norris* case the court said:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights.

In conclusion, it is pointed out that petitioner was induced to sell her husband's interest in the partnership for $380,000.00, upon written representations of the value of that interest which petitioner contended in the trial court were inaccurate and incomplete. These representations were accompanied by (1) threats to deprive petitioner of her insurance by the assertion of an alleged trust, probably

created by coercion, and subsequently revoked (Court of Appeals Opinion, 172 S. W. 2d 600, 603-604); (2) advising the insurance companies of the specious claim under the revoked insurance trust, which had the effect of depriving petitioner of $150,000.00 of insurance until she accepted the representations made as to the value of the partnership interest (same opinion, p. 604); (3) threats to destroy this interest by incorporation of the business (same opinion, p. 604); (4) threats to contest her husband's will and render it nugatory (same opinion, p. 604).

The petitioner contended in the trial court that the true value of her husband's interest in the partnership was more than $600,000.00 (Complaint, Tr. R. Vol. I. p. 98) but she was denied the right to have the original books of the partnership produced in court so that the true value of her husband's interest could be established. The trial court in denying her motion for a subpoena duces tecum to produce these books deprived her of due process of law and of her right to that kind of a hearing guaranteed by the Fourteenth Amendment.

It is respectfully submitted, therefore, that the order denying the petition for certiorari be vacated and that this petition be granted.

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I certify that this petition is presented in good faith and not for delay.

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